UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

THE WACKENHUT CORPORATION
Employer

and

SECURITY ENFORCEMENT WORKERS UNION Case 12-RC-9288
Petitioner

and

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)[1[1]]
Intervenor

DECISION AND ORDER

The Employer, The Wackenhut Corporation, a Florida corporation with an office located in Palm Beach Gardens, Florida, is engaged in the business of providing security services for various government and private entities.[2[2]] On November 28, 2007, the Petitioner, Security Enforcement Workers Union, filed a petition with the National Labor Relations Board, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of armed and unarmed security officers employed by the Employer, providing service for the Miami-Dade metro rail and bus system contract.[3[3]] According to the petition, there are approximately 110 employees in the petitioned-for bargaining unit. The Intervenor, International Union,

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[1[1]] The Intervenor's name appears as amended at the hearing.

[2[2]] The parties stipulated that during the past 12 months while conducting its business, the Employer purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Florida, and that the Employer is within the jurisdictional standards of the National Labor Relations Board. Based on the parties' stipulation, and noting the Board's assertion of jurisdiction in prior cases involving the Employer, I find that the Employer is an employer engaged in commerce within the meaning of the National Labor Relations Act and that it will effectuate the policies of the Act to assert jurisdiction in this case. See The Wackenhut Corporation, 345 NLRB 850 (2005).

[3[3]] Although the Petitioner was duly served with the Board's Notice of Representation Hearing, no representative of the Petitioner appeared at the hearing.

Security, Police and Fire Professionals of America (SPFPA), intervened in the proceedings.[4][4] On December 10, 2007, a hearing officer of the Board held a hearing in this case.[5][5]

There are three issues to be decided in this matter, the first two of which I will consider together. First, there is a question as to whether or not the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Second, there is a question as to whether or not the Petitioner meets the requirements to be certified as a representative of a unit of guards set forth in Section 9(b)(3) of the Act. Third, there is a question as to whether or not an agreement between the Employer and the Intervenor and its Amalgamated Local 612 constitutes a contract bar to the petition filed in this case.

The record does not reflect the position of the parties with respect to any of these issues. Based on the evidence introduced at the hearing and the analysis set forth below, I have determined that although there is no contract bar, there is insufficient evidence to establish that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, or that it meets the requirements to be certified as a representative of a unit of guards set forth in Section 9(b)(3) of the Act. Accordingly, I am dismissing the petition.

I. The Labor Organization Status and Section 9(b)(3) Issues

Section 9(c)(1)(A) of the Act provides that employees may be represented "by any employee or group of employees or any individual or labor organization." An election may be directed and a certification may issue only if the proposed bargaining representative qualifies as a bona fide representative of the employees. Section 2(5)

[4][4] The parties stipulated, and I find, that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

[5][5] None of the parties filed post-hearing briefs.

of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See Roytype, Division of Litton Business Systems, 199 NLRB 354 (1972); Machinists, 159 NLRB 137 (1966). Section 9(b)(3) of the Act provides, in relevant part, that no labor organization shall be certified as the representative of employees in a bargaining unit of guards (as is involved in this case) if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Despite proper and timely notice, the Petitioner failed to appear at the hearing and did not otherwise provide any evidence concerning its status as a labor organization within the meaning of Section 2(5) of the Act, or whether it meets the requirements to be certified as the representative of a unit of guards set forth in Section 9(b)(3) of the Act.[6[6]] There is no record evidence or stipulation establishing that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, or that the Petitioner meets the requirements for certification set forth in Section 9(b)(3) of the Act. In an effort to determine whether the Petitioner's status as a labor organization has been decided in any other proceedings before the Board, the Region searched agency-wide records and Board decisions. However, the Region has found no representation cases or unfair labor practice charges involving the Petitioner. Accordingly, I am dismissing the petition because there is no evidence that the Petitioner is a labor organization within the meaning of Section 2(5) of the

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[6[6]] The record shows that the Notice of Hearing in this matter notifying the parties that the hearing would be conducted on December 10, 2007, was served on the the Petitioner on November 30, 2007, 10 days before the hearing. The hearing officer recounted various other steps taken by the Regional office to notify the Petitioner about the hearing, including that he sent a notice of the anticipated hearing on December 10, 2007, to the Petitioner by facsimile on November 29, 2007, and that he had a facsimile receipt for that notice. The hearing officer further recounted that he made two telephone calls to the Petitioner's president on the day of the hearing and left a message, but was unable to reach him.

Act, or that the Petitioner meets the requirements for certification as the representative of a unit of guards set forth in Section 9(b)(3) of the Act.

II. The Contract Bar Issue

Neither the Employer nor the Intervenor expressly stated on the record that they take the position that a contract bar exists in this case. However, the hearing officer indicated that there may be a contract bar and questioned the Intervenor's representative with respect to an agreement entered into by the Employer and the Intervenor and its Amalgamated Local 612 on November 28, 2007. I have considered the record evidence and concluded that the November 28, 2007 agreement is not a bar to the processing of the instant petition. To provide a context for the discussion of the contract bar issue, I will first recount the history of bargaining between the Employer and the Intervenor before they executed the November 28, 2007 agreement and present the facts concerning the agreement in question. Then, I will set forth the reasoning supporting my conclusion.

A. Prior Bargaining History

I take administrative notice of Case 12-RC-8995, in which a petition was filed by the Intervenor on December 15, 2003, seeking certification as representative of the same unit of employees of the Employer that is involved in the instant petition. Pursuant to a Stipulated Election Agreement approved on December 22, 2003, the Intervenor won a mail ballot election conducted among the unit employees, and on March 2, 2004, the Intervenor was certified as the collective-bargaining representative of the following unit of employees of the Employer:

> All full-time and regular part-time security officers performing guard duties employed by the Employer for the Miami-Dade Transit Agency, including Metro Rail, Metro Mover, revenue and bus yard locations, excluding all other employees including office

clerical employees, professional employees, and supervisors as defined in the Act.

At the hearing the Employer and the Intervenor stipulated that the unit that was certified in Case 12-RC-8995 remains the appropriate bargaining unit.

The record testimony reflects that the Employer and the Intervenor were parties to a three-year collective-bargaining agreement that expired on November 3, 2007.[7][7]

B. The Filing of the Instant Petition

The record shows that the Petitioner filed the instant petition by submitting it via facsimile to the Tampa Regional Office on November 27, 2007 at 4:37 p.m., after the close of business at 4:30 p.m. As a result, the petition was docketed by the Regional Office on November 28, 2007.

C. The 30 Day Extension Agreement

Mike S. Swartz, vice president of Region 3 for the Intervenor, testified that the Employer and the Intervenor entered into a 30-day extension of the collective-bargaining agreement that expired on November 3, 2007, in order to engage in mediation and complete negotiations for a successor collective-bargaining agreement. The record does not reflect when the parties entered into the 30-day extension agreement, and the 30-day extension agreement was not entered into the record.

D. The Tentative Agreement

Intervenor vice president Swartz further testified that on November 28, 2007, he drafted a handwritten agreement that was signed on the same day by

[7][7] The collective-bargaining agreement that expired on November 3, 2007 was not entered into the record.

representatives of the Employer and the Intervenor at the Miami, Lakes, Florida office of the Federal Mediation Conciliation Service.

The handwritten agreement referred to by Swartz was admitted into the record as Board Exhibit 2(a). The record does not reflect whether the Employer signed the summary agreement before or after learning of the filing of the instant petition on November 28, 2007. The heading of the handwritten agreement, hereafter referred to as the tentative agreement,[8[8]] states:

SUMMARY OF NEGOTIATIONS & TENTATIVE AGREEMENT
IUSPFPA AND ITS LOCAL 612 AND THE WACKENHUT CORP.
AT MIAMI DADE TRANSIT

In addition, the tentative agreement states that the Employer and the Intervenor, along with its Local 612, "…have reached the following tentative agreement. The provisions of the current agreement are maintained unless modified below." The tentative agreement then contains numbered provisions regarding training pay, health insurance, bulletin board, labor management cooperation, personal/sick pay and attendance bonus, retroactivity and wages, and boots/shoes. The retroactivity and wage provision states, "Retroactivity – This offer will be made retroactive to Nov. 3, 2007" and then sets forth wage increases to be effective on November 3, 2007, November 3, 2008, and November 3, 2009. The boots/shoes provision states that the Employer will begin the process of providing footwear to the employees "upon ratification." The tentative agreement appears to contain the signatures of three Intervenor representatives, including Swartz, and two Employer representatives.

Although the tentative agreement provides the effective dates of wage increases, and states that the boots/shoes provision is not to take effect until

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[8[8]] Although at one point Swartz responded affirmatively to the hearing officer's question, "And you reached a final agreement on that date? (referring to November 28, 2007), when the hearing officer then asked if the "contract" was signed on that date, Swartz testified, "This stipulation summary agreement was signed on that date. …." Thus, it is not clear from Swartz's testimony that he considered the document that he drafted and titled " tentative agreement" to be a "final" agreement.

ratification of the agreement, it is silent with respect to the duration of the agreement, and with respect to the effective and termination dates of the agreement.

Approximately one week after the filing of the instant petition, on December 4 and 5, 2007, representatives of the Employer and the Intervenor and its Amalgamated Local 612 executed a collective-bargaining agreement, which is effective by its terms from November 3, 2007 through November 2, 2010. That agreement, a 21-page typed document between the Employer and the Intervenor was admitted into the record as Board Exhibit 2(b). Swartz noted that he signed the collective-bargaining agreement on December 5, 2007, while another Intervenor official and two Employer officials signed it on December 4, 2007.

E. Analysis of the Contract Bar Issue

When the circumstances are appropriate, the existence of a collective-bargaining agreement will preclude, or bar, a Board representation election involving employees covered by the contract. The Board's contract bar doctrine is intended to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." Appalachian Shale Products Co., 121 NLRB 1160, 1161 (1958). Its "fundamental premise [is] that the postponement of employees' opportunity to select representatives can be justified only if the statutory objective of encouraging and protecting industrial stability is effectuated thereby." Pacific Coast Association of Pulp and Paper Manufacturers, 121 NLRB 990, 994 (1958). Thus, in general, the doctrine's dual rationale is to permit the employer, the employees' chosen collective-bargaining representative, and the employees a reasonable, uninterrupted period of collective-bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire.

The Board has long held that because a finding of contract-bar necessarily results in the restriction of the employees' right to freely choose a bargaining representative, an

agreement must meet certain formal and substantive requirements in order to bar an election. In re Waste Management of Maryland, Inc., 338 NLRB 1002 (2003); Seton Medical Center, 317 NLRB 87 (1995). Accordingly, the Board has long required, for contract-bar purposes, that the contract: (1) be signed by both parties prior to the filing of the petition that it would bar; and (2) contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. DePaul Adult Care Communities, Inc., 325 NLRB 681 (1998); Television Station WVTV, 250 NLRB 198, 199 (1980); Georgia Purchasing, Inc., 230 NLRB 1174 (1977).

Furthermore, it is well settled that the party asserting that a contract is a bar to an election bears the burden of proving the facts establishing the applicability of the contract-bar doctrine. Jackson Terrace Associates, 346 NLRB 180 (2005); Roosevelt Memorial Park, Inc., 187 NLRB 517 (1970); Bo-Low Lamp Corporation, 111 NLRB 505 (1955).

In Pacific Coast Association of Pulp and Paper Manufacturers, supra, the Board held that contracts having no fixed duration will not be considered a bar to a representation petition. Without addressing the issue of whether such contracts were otherwise valid agreements, the Board concluded that it would unjustifiably abridge the statutory right of employees to seek representatives if the contract-bar policy were extended to parties who did not enter into "mutual and binding commitments thereby reasonably insuring that for the duration of the agreement neither party will disrupt the bargaining relationship by unilaterally attempting to force changes in the conditions of employment upon the other." Id. at 994. Accordingly, contracts which lack termination or duration provisions have long been held not to bar elections.

Applying the relevant Board precedent to the facts of the instant case leads to the conclusion that the agreement that the Employer and the Intervenor entered into on November 28, 2007 is not a bar to the instant petition. In particular, the agreement does not contain any language providing for the duration of the agreement. In addition, the agreement is a tentative one and is subject to ratification,

and the record fails to establish when the Employer learned of the filing of the instant petition. The Board has long held that a memorandum of agreement which has no fixed duration is a temporary stopgap measure and does not constitute a bar to a petition. Dalmo Victor Company, 132 NLRB 1095 (1961). Likewise, in Crompton Company, Inc., 260 NLRB 417 (1982), the Board stated that one objective of the Board's contract-bar rules is for a collective-bargaining agreement to have a fixed term on its face so that anyone can immediately ascertain when the open period begins and ends and can know when a representation petition may be appropriately filed.

The November 28, 2007 agreement did not contain any language providing for an effective commencement date. In National Broadcasting Co., 104 NLRB 587 (1953), the Board held that a contract does not bar an election if a petition is filed with the Board before the effective date of the contract (where it is effective at some time after its execution). In the instant case, the November 28, 2007 agreement does not specify its effective date and, thus, cannot serve as a bar to the petition.

Likewise, the November 28, 2007 agreement does not contain any language providing for the expiration date of the agreement. In Bob's Big Boy Family Restaurants, 259 NLRB 153, 154 (1981), enf. denied, 693 F.2d 904 (9th Cir. 1982), the Board decided that a contract may be deprived of its bar quality if it does not clearly reflect its expiration date. In particular the Board stated that "where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred."

While it is possible that, during their negotiations, the Employer and the Intervenor may have discussed and agreed on the duration, as well as the effective commencement and expiration dates of the November 28, 2007 agreement, such terms must be included on the face of the signed document in order for the contract to bar the processing of a representation petition. Thus, the Board typically limits its inquiry to the four corners of the document or documents alleged to bar an election and has

excluded the consideration of extrinsic evidence. See United Health Care Services, 326 NLRB 1379 (1998); Jet-Pak Corp., 231 NLRB 552 (1977); Union Fish Co., 156 NLRB 187, 191-192 (1965) ("[T] he Board requires that the term, as well as the adequacy of a contract, must be sufficient on its face, with no resort to parol evidence necessary, before the contract can serve as a bar.").

An exception to the exclusion of parol evidence in contract bar cases involves the execution date of the contract. Where, as here, the execution date is not clear from the face of the document, the Board may look to evidence outside the document to ascertain the execution date. Road & Rail Services, 344 NLRB 388 (2005), and cases cited therein; see also Cooper Tank & Welding Corp., 328 NLRB 759 (1999) (absence of an execution date on a contract does not remove the contract as a bar to a petition if it can be established that the contract was, in fact, signed before a petition was filed). Thus, I will accept the undisputed testimony of Swartz as evidence that the parties executed the tentative agreement on November 28, 2007.

In Deluxe Metal Furniture Co., 121 NLRB 995, 1001 (1958), the Board held that a contract executed on the same day that a petition has been filed will bar an election if "the employer has not been informed at the time of execution that a petition has been filed." Here, it is unclear whether the Employer entered into a contract before or after receiving notification of the filing of the petition. In this regard, the petition was received by the Regional Office after office hours on November 27, 2007, and therefore it was filed on the following day, November 28, 2007. Although the record shows that the Petitioner's showing of interest was submitted on November 28, 2007, the Board deems it insignificant whether notice of the petition is received before mechanical details of the filing have been completed, such as affixing the date and time stamp in the Regional Office. Rappahannock Sportswear Co., Inc., 163 NLRB 703 (1967). Thus, if the Employer learned of the filing of the petition prior to signing the November 28, 2007 agreement that it entered into with the Intervenor, then the agreement would not serve as a bar to the petition.

However, even without knowing when the Employer first learned of the filing of the petition, I find that the November 28, 2007 agreement is not a bar, as described above.[9[9]]

In sum, I find that the November 28, 2007 agreement entered into by the Employer and the Intervenor is not a bar to the instant petition because the agreement did not specify its duration, or effective commencement or expiration dates, and the evidence fails to establish that the Employer had no knowledge that the petition had been filed as of the time it executed the agreement.[10[10]]

III. Dismissal of Petition

Based upon the entire record in this matter and in accordance with the discussion above, I have determined that there is no evidence that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, or that the Petitioner meets the requirements for certification as the representative of a unit of guards set forth in Section 9(b)(3) of the Act.[11[11]]

Accordingly, IT IS ORDERED that the petition in this case be dismissed.

IV. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-

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[9[9]] Neither the Employer nor the Intervenor asserted that the 30-day extension agreement is a contract bar. I note that the extension agreement is not in evidence and there is no evidence as to when it was executed, but that even if the 30-day extension was in evidence and was in effect as of the date the petition was filed, it would not operate as a bar because it was of less than 90 days duration. Crompton Company, 260 NLRB 417 (1982).

[10[10]] I also note that the agreement is titled a tentative agreement and it appears that the effective date of at least one of its terms was subject to some type of ratification.

[11[11]] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me as Regional Director.

0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **January 25, 2008**. Immediately upon the filing of a request for review, copies thereof shall be served on the Regional Director and the other parties. The request may not be filed by facsimile.[12[12]]

DATED at Tampa, Florida this 11th day of January 2008.

/s/[Rochelle Kentov]
National Labor Relations Board – Region 12
Fifth Third Center
201 East Kennedy Blvd. - Suite 530
Tampa, Florida 33602-5824

[12[12]] A request for review may also be submitted by electronic filing. See the attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website.